

1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF TEXAS
3 HOUSTON DIVISION

4 AETNA LIFE INSURANCE . Civil Action
5 COMPANY . No. 12-1206
6 .
7 VS. .
8 .
9 . January 3, 2014
10 HUMBLE SURGICAL . 10:17 A.M.
HOSPITAL, LLC . HOUSTON, TEXAS

11 TRANSCRIPT OF PROCEEDINGS
12 BEFORE THE HONORABLE LYNN N. HUGHES
UNITED STATES DISTRICT JUDGE

13 APPEARANCES:

14 FOR PLAINTIFF:

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16 MS. DENA HANOVICE PALERMO
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19 FOR DEFENDANT:

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25 Proceedings recorded by mechanical stenography, transcript
produced by computer-aided transcription.

1 APPEARANCES (Continued):

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4 ALSO PRESENT: MS. KAREN CHOTINER

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P R O C E E D I N G S

1 (January 3, 2014)

2 THE COURT: Mr. Melton, you do not need to rise.

3 You may if you want to. It is not obligatory
4 in the least. Are you mending?

5 MR. MELTON: Yes, I'm out of a wheelchair.

6 THE COURT: Makes you grateful, doesn't it?

7 I have just signed an order, which the clerk is
8 copying, that requests Humble to disclose its Houston lawyers'
9 contacts with the Connecticut firm and the New Jersey firm
10 over the last five years.

11 Any question about that?

12 MR. MELTON: I don't have any questions yet, Your
13 Honor.

14 THE COURT: It may not have been entered yet. I
15 just did it 20 minutes ago.

16 Mr. Melton, tell me about this transcript
17 problem.

18 Have you seen, Mr. Shely, the proposed
19 confidentialities?

20 MR. SHELY: With respect to, Your Honor?

21 THE COURT: The transcript of the October 24th
22 hearing.

23 MR. SHELY: I'm familiar with it, Your Honor. And I
24 don't know if there's any issue relating to it or not.

25 THE COURT: I'm a little confused. The proposed

1 secrets -- the order of confidentiality has been substantially
2 modified, but I am perplexed that how on page 56, line 11 is
3 confidential where the Court says: "Interesting that the
4 increases in hospital charges are treated as inflation."

5 Can you give me some hint about the privacy
6 concerns connected with that observation?

7 MR. MELTON: Your Honor, I'm not looking at the
8 transcript. The discussion was how Humble Surgical Hospital
9 raises its rates. We view that as confidential so that our
10 competitors don't get access to our internal business
11 practices.

12 THE COURT: Even to the extent that Humble has
13 internal business practices that are confidential or
14 proprietary, that cannot be in a conceivable world that you
15 adjust prices according to inflation or you call increases in
16 expenses inflation, or inflation increases in expenses.
17 However you slice it, that's not a business practice, it is
18 not a plan, it is not specific products or services that are
19 being marketed and the price charged -- or the price, usually
20 it is the cost that is the problem, sometimes prices are.

21 On page 59 a discussion starting on --
22 discussion continued -- but the redacted part starting on line
23 7 reflects that the Ingenix index, I will call it, was
24 multiplied by a price of three. That is just a fact. That is
25 not confidential.

1 MR. MELTON: Your Honor, it is the same. The way
2 Humble Surgical Hospital set in this case the charge master we
3 view that as trade secret and confidential. We don't want our
4 competitors knowing how we set our prices. And they are not
5 entitled to that information.

6 THE COURT: Page 62, line 12, Dr. Kabichi
7 [phonetics], says, "Your Honor, that's why we use the HPS
8 system which is used across by other major hospitals." If it
9 is used by a whole bunch of people how can that be
10 confidential, much less proprietary?

11 MR. MELTON: Your Honor, the same response. What we
12 do is not -- everybody else is not entitled to understanding
13 our internal business practices for competitive reasons. If
14 it was mandated that we use that method I could see the
15 argument. But we make choices on how we do it. It doesn't
16 matter whether others make the same choice.

17 THE COURT: And the whole bizarre series of
18 questions and answers on page 63 where they used Ingenix and
19 multiplied something by three, but they didn't use the
20 hospital Ingenix because they had gone out of business. How
21 did you get the first part if you have two different forms of
22 Ingenix indices? You used one and you didn't use the other
23 one, because they were out of business. You have marked that
24 as confidential and privileged. It is inconsistent, evasive
25 and probably some other things. Confidential, proprietary,

1 secret, privacy related, it is not. This whole thing is about
2 buying commercially available indices. On page 67 you want to
3 keep secret the Court's statement. It talks about various
4 data bases and other vaguenesses.

5 MR. MELTON: Your Honor, this whole discussion was
6 about how we set our internal pricing.

7 THE COURT: That's how you do it in any precise way,
8 it is the Court's observation about how you described how you
9 came up with it.

10 MR. MELTON: Yes, sir.

11 THE COURT: You can't use that sentence of mine to
12 go price hospital services, or I guess you could; just give
13 some vaguenesses and some databases and bingo, you have a
14 charge master.

15 MR. MELTON: Your Honor, we went through it
16 specifically looking for characterizations or statements about
17 our internal business processes. We didn't blanket try to say
18 the whole transcript was -- we went through it for specific
19 reasons. That was to protect our internal pricing, trade
20 secrets from the market.

21 THE COURT: Did you follow the processes in the
22 confidential order?

23 MR. MELTON: We believe we did, Your Honor, yes.

24 THE COURT: Did Aetna agree to those decisions?

25 MR. MELTON: I don't believe we have heard back from

1 them.

2 MS. DOWNEY: Your Honor, I called the Court
3 coordinator to try to make sure we were following the
4 procedure correctly, because there was, I believe, a Southern
5 District ruling on how to designate hearing transcripts
6 confidential.

7 THE COURT: I entered an order.

8 MS. DOWNEY: You're right, Your Honor. Based off
9 the order it said within 30 days of receiving the transcript
10 we needed to designate it confidential. So I called the Court
11 coordinator and she suggested that I let the court reporter
12 know, and that once it was designated confidential and entered
13 into the record, redacted, if the other side had any issue
14 with what was redacted we could both brief the issue and bring
15 it before the Court.

16 THE COURT: Mr. Shely, were you asked to consent to
17 these?

18 MR. SHELY: No, Judge. And again, we haven't
19 focused on that at all.

20 THE COURT: Probably took time off or something.

21 MR. SHELY: Well, no, just keeping track of the new
22 lawsuits they have been filing, Judge. It has been a full
23 time job the last couple of weeks.

24 THE COURT: I think we will make everybody go to
25 Connecticut for the rest of the week. The survivors can come

1 back and we probably can resolve this.

2 MR. SHELY: I understand the weather is beautiful
3 today, Judge.

4 THE COURT: I only went through the first hundred
5 pages of the transcript. And I assume the rest of it is
6 consistent. That seems like a fair sample.

7 Ms. Downey, the redactions covered by that rule
8 are Social Security numbers, minor's names, things like that.
9 They are not court comments. Of course, it's...

10 Treating Joanna Stanley's [phonetics] e-mail of
11 December 26th as a motion by Humble to seal those parts of the
12 transcript of October 24th, it is denied.

13 All right. Mr. Shely, are you prepared about
14 something?

15 MR. SHELY: I am, Judge.

16 THE COURT: Okay.

17 MR. SHELY: The Court, of course, has set show cause
18 order as to why Humble's answers should not be struck because
19 it has filed related litigation and has threatened Aetna with
20 suit and filed suit involving the precise, exact conduct that
21 this Court ruled upon and said Aetna could do, and it is time,
22 Judge, Aetna's view, to put an end to this.

23 Two years ago, nearly two years ago, Aetna
24 filed suit claiming that physician owners of Humble were
25 referring patients and charging outlandish amounts to get

1 extra money. Despite multiple orders of this Court for Humble
2 to disclose all relevant documentation, everything, to use the
3 Court's phrase, about Aetna's claim under its money had and
4 received theory for overpayment, Humble didn't do it. Humble
5 went through a number of lawyers, different sets of lawyers,
6 Humble said it had complied. It has never been the case.

7 Now, fast-forward after spending all this money
8 and all this Court time on what the Court set as it has every
9 right to do in its discretion for case management that first
10 we would do the accounting, first we would determine how much
11 has been overpaid by Aetna. Putting aside for another day
12 Aetna's other counts, such as fraud, putting aside other
13 defenses or motions or claims that Humble would like to
14 assert, now this Court set the logical step of we are going to
15 do the accounting first. The reason --

16 THE COURT: It seemed logical at the time.

17 MR. SHELY: I think it was, Judge. In the end the
18 reason it has taken this long, nearly two years to get to this
19 point is because of Humble's recalcitrance. That
20 recalcitrance has now morphed to defiance.

21 Let's figure out what has happened here.
22 Humble runs in with an alleged emergency motion saying that
23 Aetna is sending out letters to doctors and posting
24 information on a site available to members for the purpose of
25 explaining its position as to Humble. They run in and they

1 say you can't do that. Judge Hughes, please stop them. Here
2 are the actual letters they've sent. Here's the note, you've
3 read them on the bench. The Court heard the arguments, had a
4 hearing over two days and held expressly and followed up with
5 a written order that Aetna was entitled to do precisely what
6 it had done; send the letters, post the website, because it is
7 in connection with its plan and claim administration.

8 You entered an order on the 26th of November
9 that said exactly that. We went to mediation requested by
10 Humble the next week. It was unsuccessful. Aetna filed a
11 notice saying it has been unsuccessful and we would like when
12 the Court has the time for it to rule on our motion for
13 judgment. In that motion for judgment we have proven that
14 Humble expected only a third of what it was billing Aetna. As
15 the Court indicated early on in the case Humble had a duty to
16 do honest billing. It did not.

17 There's an admission of Humble, several
18 admissions, in fact, in the record and on the record that they
19 only expected a third. That is a basis for Aetna's motion for
20 judgment and a supplemental motion for judgment in which it is
21 specifically at Docket No. 129 a reply brief in support of
22 both where Aetna seeks \$20,802,424.35 as it has proven up.

23 Now, in addition to the merits of the motion
24 for judgment as this Court has stated and given Humble many
25 last chances it must comply with the Court orders regarding

1 discovery and any other matters set by this Court. It has not
2 done so. Most recently, after losing the motion that it
3 brought for this Court the week of Thanksgiving and after the
4 mediation failed and after this Court issued an order saying,
5 Aetna I have got your notice and I am going to rule on the
6 motion for judgment, they go up without notice to this Court
7 or to Aetna through counsel and filed suit in Connecticut
8 raising the exact same issues -- it tracks word for word,
9 Judge. I have got an exhibit here. I'm sure the Court has
10 read it, I did, where you can see that Aetna's notice of
11 violation of the order, Docket No. 166 filed in this Court and
12 was heard several days later uses the precise language that
13 they use in their Connecticut lawsuit at Paragraph 17 and 18.

14 There are other examples. So to see the
15 response filed late last night of Humble that really there
16 isn't any duplication here and there isn't any related
17 litigation is hogwash. In fact, the response filed by Humble
18 to this Court's show cause order really serves not as a
19 defense of its conduct, but as an indictment. Because it is
20 clear that they are going to run anywhere, Judge, and anyplace
21 that has opportunity, and file lawsuits against Aetna about
22 the conduct that is properly before this Court. This Court
23 has spent nearly two years on this case. Because they don't
24 like your rulings, Judge. It is simple as that. They don't
25 like the way you are managing the case, Judge.

1 Well, the last time I looked, Rule 1 of the
2 rules in this Court's discretion allows this Court case
3 management ability. And so, they simply don't like that the
4 accounting is being decided first. So what do they say in
5 response to filing a second -- we were supposed to have this
6 hearing last Friday, Judge. They said, we don't want to be
7 there on the 27th. The Court gave them a week, fair enough.

8 THE COURT: I didn't want to be here either.

9 MR. SHELY: I understand, Judge, that made it three
10 for three.

11 THE COURT: But I was here. That's the only
12 difference.

13 MR. SHELY: Instead on the 27th, last Friday, they
14 filed a suit in New Jersey.

15 THE COURT: That's just a coincidence.

16 MR. SHELY: I'm sure it is a coincidence, Judge. So
17 in that suit they are asserting a bunch of ERISA claims.

18 Now, they have filed in this case a motion for
19 leave to file a counterclaim. And as I read their response
20 that they filed last night they don't think -- they have no
21 reason to believe that you are going to grant that motion. I
22 don't know how they could know that because you haven't ruled
23 on it yet. What they really don't like, Judge, is that you
24 are deciding --

25 THE COURT: Anybody ever tells you they know what I

1 am thinking you know they are wrong. I don't know until I do
2 it.

3 MR. SHELLEY: I understand, Judge. And they have said
4 that you refused to actually address their motion for leave.
5 Again, they don't like the way you are running this case,
6 Judge. And they are bound and determined to try to do
7 something about it. So they have now filed in the last ten
8 days or so two lawsuits, one in Connecticut claiming -- making
9 the same state law claims. Well, we removed it. They pled a
10 beautiful completely preempted claim. It is removed, it is in
11 federal court. We are going to file a motion to transfer it
12 down to this Court.

13 THE COURT: Thanks.

14 MR. SHELLEY: Yes, Judge. I think -- can't predict
15 what a court is going to do, but I have a feeling it will be
16 sent this way. And then I guess they had a week go by, so
17 here's another one. We can go file in New Jersey too. And
18 they have got this dichotomy in their head, you can tell from
19 their papers, that, well, we get to do state law claims and
20 federal ERISA claims over here. I don't think they went back
21 and looked at their motion for leave to file a common claim or
22 a proposed complaint. They say they know what you are going
23 to do about that.

24 But there they asserted ERISA claims and state
25 law claims; breach of contract, insurance code and some

1 others. So if they want to bring claims against Aetna, fine,
2 it will -- it should be in this Court. It should be when this
3 Court determines that the next step of the case is going to
4 take place. We opposed on two grounds their motion for leave
5 to file their counterclaim. One was it was late. They filed
6 it facing the motion for judgment. They suddenly found a
7 counterclaim, not a novel stretch to... dispositive motion.

8 THE COURT: 16 months into the case.

9 MR. SHELY: Yes, Judge. They said they had just
10 discovered they had the claim based upon something we had just
11 said. That's hogwash. We also said that the Court should not
12 decide it until it has ruled on the motion for judgment.

13 That's what -- I guess that's what the Court has decided to
14 do. It is going to have the accounting issue handled first.

15 So there's about one thing that I can see in
16 their response that they filed last night to your show cause
17 orders that Aetna and Humble agree on. That's that you can
18 enjoin them. You can enjoin them from proceeding in any other
19 court as to any claim against Aetna except for right here in
20 front of you. And we are requesting that you do so because we
21 got two down, but we don't want 48 others that we have to go
22 figure out. I think they have shown what they are about.
23 What is really going on here, Judge, is Humble and its
24 principals don't think you will act. They have been told
25 before that it was their last chance and nothing really

1 happened to them. They have been told that the motion for
2 judgment is going to be ruled upon, but it hasn't been yet.
3 And so their view is we will just try to hold things steady
4 down there in Houston, and we are going to go see if we can go
5 get a different judge who will rule for us in a manner
6 different from the way Judge Hughes is running the case.
7 That's what they are doing.

8 If they want to get up here and tell you these
9 cases aren't related, I ask you to compare the language that
10 they used. They have already asserted an ERISA claim in this
11 Court. There's nothing wrong with deciding the accounting
12 issue first. They don't seem to like that approach, Judge.

13 But I want to -- I want to end with where I
14 started. Almost two years ago we filed this suit. We didn't
15 get the kickback documents from Humble directly despite orders
16 from this Court to produce everything. No-no, no-no. We
17 discovered -- I believe it was in May or June that one of
18 those documents was attached -- or found out it was attached
19 or found out later because of a proceeding that a doctor who
20 is in a dispute with Humble brought.

21 And even then wrote a letter immediately to
22 Humble's counsel, and I said I want those documents. They
23 said no. You ordered them produced. You said produce
24 everything. They didn't do it. It wasn't until we had our
25 show cause hearing and the next day a deposition of the person

1 where they finally were in the corner and you told them to
2 produce it.

3 THE COURT: Again.

4 MR. SHELY: Again, Judge. So by name, by almost
5 serial number. Now, Humble has gotten away with that to date.
6 They shouldn't get away with it anymore. Not only is it
7 inefficient, not only is it costing money, it is not the way
8 the rules and the system works. They don't think you are
9 going to rule. They don't think you are going to do anything
10 to them so they are going to keep up this conduct.

11 So what we are asking you to do, Judge, is rule
12 on Aetna's motion for judgement on the merits. We are asking
13 that you strike Humble's answer. We are asking that you also
14 grant Aetna's motion for judgment based upon the sanctionable
15 conduct, the continued conduct of Humble in this case. And we
16 are asking that you enjoin Humble from proceeding in any claim
17 against Aetna, in any form other than before you, so that we
18 can at least know which court we are in and not have them go
19 around the country sprinkling lawsuits during the holiday
20 season. Thank you, Judge.

21 THE COURT: When they are too busy to be here.

22 MR. SHELY: We did note that, Judge. But Humble
23 was -- had enough hands to file an extra lawsuit.

24 THE COURT: Mr. Ross, come sit here and hold his
25 crutch, please. So you don't have to bend and twist. I don't

1 know what you did to your leg but it can't be good for you to
2 be doing the hokey pokey trying to manage your crutch.

3 MR. MELTON: May I proceed?

4 THE COURT: Yes, sir.

5 MR. MELTON: Your Honor, we are here today to show
6 cause why our answers should not be struck for filing.

7 THE COURT: Let me interrupt. Humble offered an
8 exhibit that was a PowerPoint slide show sort of thing about
9 Humble Surgical and the building and its role in the
10 community. Do you remember that? Your first hearing?

11 MR. MELTON: Yes, Your Honor.

12 THE COURT: Was that made part of the record?

13 MR. MELTON: I don't believe it was. You handed it
14 back to me.

15 MR. SHELY: I believe it was not made part of the
16 record, Judge, because that was a hearing in chambers and I
17 believe he gave --

18 THE COURT: It was on screen right there.

19 MR. SHELY: Maybe there was a subsequent hearing --

20 MR. MELTON: The first hearing was in chambers.

21 THE COURT: Was -- I thought we had one where there
22 were pictures of the building.

23 MR. SHELY: There have been pictures of the
24 building, Judge, but I believe both before Mr. Melton's
25 appearance and at the first hearing for Mr. Melton he had a

1 PowerPoint that you looked at and gave back to him. I don't
2 believe it was made part of a record.

3 THE COURT: My recollection is I interrupted him
4 halfway through it.

5 MR. SHELY: Well, Judge, that may have happened. I
6 still remember it the way I have stated.

7 THE COURT: I could have mixed him up with another
8 27,346 people I have interrupted.

9 Do you think you know what I am talking about?
10 It was about the cost of the building and pictures of the
11 building.

12 MR. MELTON: I believe it was at the first hearing.
13 I handed it to you, and you handed it back. It was not made
14 part of the record.

15 THE COURT: I would like to make that part of the
16 record. Please file it.

17 MR. MELTON: Yes, Your Honor.

18 THE COURT: I am assuming you don't have a handy
19 hard copy?

20 MR. MELTON: We do not.

21 So, there are two reasons the answer shouldn't
22 be struck for doing what the Court expressly allowed. First,
23 we don't believe the Court even addressed the libel, slander,
24 defamation issue. Two, striking of our answers is not an
25 appropriate remedy for what we did.

1 THE COURT: What is the appropriate remedy?

2 MR. MELTON: They are saying --

3 THE COURT: What is the appropriate remedy?

4 MR. MELTON: Injunction if it is available would be
5 an appropriate remedy. I will address that.

6 First, we didn't violate the Court's order.

7 THE COURT: Which order?

8 MR. MELTON: The order dated November 26th, 2013.
9 Order on relief. "Aetna Life Insurance Company may use
10 information about the practices and providers that it has
11 learned regardless of its source as long as its use is
12 directly related to its participants, plans, providers,
13 practices, physicians and other aspects of claim
14 administration."

15 That was the order.

16 We don't complain about the source of the
17 information they use in the Connecticut action. We don't
18 complain. In fact, we don't even know what the source of the
19 information is.

20 THE COURT: I have read the complaint in
21 Connecticut.

22 MR. MELTON: Right. We are complaining about what
23 they say, not the source of the information. We were in front
24 of the Court on our notice of violation of confidentiality
25 order. That was what we have filed.

1 THE COURT: I know what you were here for.

2 MR. MELTON: Document No. 166. At the time, we
3 believed they had used documents produced in this
4 litigation --

5 THE COURT: I don't want to rehear that. As fond as
6 you are rehearing everything -- do you have the Connecticut
7 complaint?

8 MR. SHELLEY: Judge, it is attached as Exhibit 4 --

9 THE COURT: Here it is.

10 MR. SHELLEY: -- to Document 182.

11 THE COURT: Page 3, Paragraph 17 says something
12 about the source of the information in the Connecticut action.

13 MR. MELTON: Your Honor, that's not our complaint.
14 Our complaint --

15 THE COURT: Why is it in there?

16 MR. MELTON: Which page, Your Honor?

17 THE COURT: Paragraph 17, page 3. Do they really
18 still use esquire in Connecticut?

19 MR. MELTON: Yes, Your Honor.

20 THE COURT: They still have separate courts of laws
21 of equity, don't they?

22 Texas was the first American jurisdiction to
23 merge law and equity. My guess is that you had a bunch of
24 young revolutionaries sitting around and they said we never
25 understood that stuff anyway. Let's kill it.

1 MR. MELTON: Your Honor, that one sentence is
2 background. It has nothing to do with causative action.

3 THE COURT: Why is it in there?

4 MR. MELTON: Background, Your Honor.

5 THE COURT: It is not background. It is an attempt
6 to throw an extraneous fact, which is false, to color it. It
7 is not background. It is a thinly veiled insult.

8 MR. MELTON: Your Honor, we don't believe it is
9 false.

10 THE COURT: What are the elements of defamation in
11 Connecticut?

12 (Pause in the proceedings)

13 THE COURT: Mr. Sklaver writes beautifully short
14 paragraphs.

15 MR. MELTON: Yes, Your Honor.

16 THE COURT: He has probably read the rules
17 somewhere.

18 MR. SHELLEY: He also incorporated every one of his
19 statements into a second cause of action, Judge.

20 THE COURT: As near as I can tell, the falsely
21 defamatory things, a lot of this... defamatory but absolutely
22 true is that they have told people with whom they are dealing
23 that are having to treat Humble claims differently because of
24 the arrangement Humble had with physicians.

25 MR. MELTON: Yes, Your Honor. They falsely alleged

1 that we entered into illegal and improper and unethical
2 agreements --

3 THE COURT: You don't have to repeat yourself three
4 times, Mr. Melton. They said the contracts with the
5 physicians and the billing practices at Humble were wrong.
6 You say they are right. That's a dispute. And it is being
7 communicated in direct connection with the joint business of
8 Humble, Aetna, and most of all, the overlooked participants.

9 MR. MELTON: As well as others.

10 THE COURT: That's probably privileged. Not in the
11 sense you like to use it, but in the sense that a legitimate
12 dispute and comment even if they turn out to be wrong is about
13 the business of the parties can't be defamation.

14 MR. MELTON: We disagree. Getting out there in
15 letters --

16 THE COURT: Mr. Melton, I have told you a number of
17 times I don't care whether you agree with me. Do not keep
18 saying that after I say something. I know how they are
19 communicating. What is the subject of the letter to the
20 participant?

21 MR. MELTON: The subject of the letter to the
22 participant? They're telling them on the phone and in
23 letters --

24 THE COURT: I asked you the content of the letter is
25 about what, and don't tell me about phone calls or websites.

1 Answer my question, please.

2 MR. MELTON: They tell them we are falsely violating
3 Texas law.

4 THE COURT: The subject of the letter is the
5 participant's insurance policy, isn't it?

6 MR. MELTON: Subject of the letter is Humble
7 Surgical Hospital and its business.

8 THE COURT: The reason Aetna sends the letter to Jim
9 Bob in Tulsa is because it has a financial relationship to
10 whom it actually bears a fiduciary duty to tell them about how
11 it is going to handle claims, and a brief explanation of why.
12 That is a communication about a joint, legitimate, business
13 concern. In Texas law it is privileged, and cannot be the
14 subject of slander.

15 And I suspect since we borrowed that from
16 England so did Connecticut just a hundred years earlier.
17 These communications are business communications to existing
18 people. And no matter what the reason it -- people may cancel
19 their surgery if they find out one of two things; the carrier
20 is not going to pay for it, or there's some question about the
21 propriety of the billing question. It doesn't have to be
22 proved. Consumers don't have to go to a grand jury to find
23 out what to do. But there's some question about how the
24 billing is going on, they may do that. And that's directly
25 related to their legitimate interest.

1 So, there is a legitimate question about
2 Humble's billing practices. If there hadn't been, there
3 wouldn't have been three sets of lawyers delaying every
4 discovery request and claiming they weren't with us, they were
5 with a wholly owned subsidiary of the majority shareholder of
6 Humble and all of the other shallow, devious, evasions,
7 obstructions, all coupled with a vehemence of advocacy that
8 pass the rational. Humble thinks there's a legitimate claim
9 because it doesn't want to talk to me about what it is really
10 doing. So there is a legitimate claim. It is not defamation,
11 filing a defamation suit 1600 miles away, something like that.
12 The week you couldn't possibly be here for the hearing, but
13 you could prepare other actions in other states.

14 MR. MELTON: Your Honor, could I address that?

15 THE COURT: Sure.

16 MR. MELTON: Mr. Ross was in California. I was in
17 Louisiana at the time the order came out to be here on that
18 Friday. We did not delay, as he says, because we just wanted
19 to file -- to be honest with you, we thought it was filed the
20 day before Christmas. We didn't find out until later it was
21 going to be filed Friday. We thought it was going to be filed
22 on the Tuesday before Christmas, this class action that he
23 says we surreptitiously delayed this hearing to file it on the
24 day we were going to be in this hearing. It is wrong. He
25 should have never said it.

1 THE COURT: Mr. Melton, you are wandering off the
2 track again.

3 MR. MELTON: I hear you. But I don't want it to be
4 alleged that my attorneys and I were somehow delaying this
5 hearing for any reason other than we were out of the state.

6 THE COURT: Let me rephrase that. Did you go see
7 your mother?

8 MR. ROSS: I did.

9 THE COURT: She is a lot nicer than he is.

10 MR. ROSS: She reminds me of that all the time.

11 (Discussion off the record)

12 THE COURT: Mr. Melton, let me rephrase the
13 position. Humble was supposed to be here on the 27th. Humble
14 couldn't be here on the 27th. Humble could file other
15 lawsuits, other places using apparently a common word
16 processing database. While Mr. Ross is always welcome, he's
17 not counsel of record -- stuck with him now because he's shown
18 up, but Ms. Downey and you and the other woman have been
19 showing up and -- as I recall, two sets of Jackson Walker
20 lawyers.

21 MR. SHELLEY: Yes, Judge, there was a set before the
22 Fifth Circuit and then after the Fifth Circuit opinion.

23 THE COURT: So Humble has had lots of representation
24 and it has gotten lots of orders from the Court about
25 producing stuff related to this dispute, and yet it was May,

1 June before a cooperation agreement was discovered elsewhere,
2 but by Aetna. And then it still required a court ordered
3 supervised deposition of the principal of Humble to get the
4 rest of them.

5 MR. MELTON: That's not accurate, Your Honor.

6 THE COURT: It is accurate.

7 MR. MELTON: That is not accurate. We briefed it --
8 if the Court would have ordered it -- the Court knew about it
9 before that deposition. We had briefed the entire issue
10 before the deposition. It was pending before the Court. The
11 Court --

12 THE COURT: When did you produce them?

13 MR. MELTON: After the Court ruled we should produce
14 them.

15 THE COURT: When? How soon? You have produced
16 stuff after I ordered, but sometimes it is a year. When?
17 First of all, Mr. Melton, I have gone through this with you,
18 but you may not remember. This is not a game where you do as
19 little as humanly possible where you think you can plausibly
20 argue that it meets the letter of the law. We have had
21 numerous conversations -- we, that is Humble and I -- but a
22 lot with you too -- give them the records about their billing
23 practices and what I will call the referral problem. And it
24 took from April of 2012 until June of '13.

25 MR. SHELLEY: No, Judge. We discovered in May or June

1 one of the documents as a result of another proceeding. We
2 weren't given these until we had the deposition, which I think
3 was in late October, and then subsequent -- it was probably
4 November was the first time that we were produced the
5 underlying documents. And it did result from your order at
6 the end of the deposition in your jury room. And you gave
7 them two or three weeks thereafter and they were produced
8 sometime in that time period.

9 MR. MELTON: Yes, Your Honor.

10 THE COURT: Wait a minute. From the date the case
11 was filed and we immediately began discussing --

12 MR. SHELLEY: Yes, Judge, from April of 2012 to
13 November 2013 Aetna did not have underlying documents related
14 to its claim.

15 MR. MELTON: The referrals were never raised at any
16 hearing prior to our involvement in the case. The first time
17 the referrals were raised were in correspondence between
18 Mr. Shely --

19 THE COURT: Counsel --

20 MR. MELTON: -- and us.

21 THE COURT: -- the problem, you've just illustrated
22 what I can ultimately -- ultimately complained about. The
23 other side does not have to say, please allow us to discover
24 the contract between Dr. Ferguson and Humble dated May 12th,
25 2011. That's not how discovery works, and I guarantee you

1 that's not how discovery requests you send are phrased. Do
2 you want me to show the last discovery request you sent in a
3 new case?

4 MR. MELTON: I can, Your Honor.

5 THE COURT: It has two pages of definitions of what
6 a document is and then all and every each -- all and paper and
7 it just goes on synonym after synonym, doesn't it?

8 MR. MELTON: I would have to look at the last one I
9 sent, Your Honor. Some courts don't allow discovery requests.
10 In the Eastern District of Texas they don't allow them.

11 THE COURT: Well, I don't allow them except after I
12 find out whether they are carefully tailored. So I saved you
13 from getting this sort of stuff you must file elsewhere. But
14 there were continual orders for full disclosure of everything
15 related to this. Despite a varied if not checkered career to
16 be a lawyer, I never ran a clinic or worked in one. That is
17 little high tech for me.

18 So I can't sit there, Shely can't sit there and
19 come up with exactly which documents they want. So when I
20 say, give them all the documents related to this billing
21 practice, that would include the arrangements by which Humble
22 is kicking back to the doctors part of the fee.

23 MR. MELTON: Your Honor, and when it was briefed we
24 disagreed. We filed briefing with the Court. We didn't run
25 from you. We --

1 THE COURT: You didn't produce it in June of 2012.
2 By "you," I mean Humble. You can't start over when you join
3 the case, Mr. Melton.

4 MR. MELTON: Your Honor, respectfully, the orders
5 issued by this Court did not go to that level. We were trying
6 to comply. And if you look, remember the Exhibit 11? They
7 are not up here today. At that deposition they listed 20
8 things they wanted. We got it very specifically. We made it
9 an exhibit to the deposition and I planned -- we have given
10 them everything they want. These agreements were raised. We
11 disagreed. We produced it. The Court ruled on it. We gave
12 it to them. We are not running from discovery.

13 MR. SHELY: Judge, your very first order told them
14 to give us the materials ahead of our first hearing related to
15 the claims. All they had to do was look at, among other
16 things, paragraph 8 of our complaint, which talks about
17 physician owners getting money for referring patients, gouging
18 Aetna, and they should have known that. It is Aetna's view
19 that Humble didn't want us to know about this. That's why
20 they claim everything was a trade secret and confidential and
21 not a word was said about it until Aetna discovered it.
22 That's the point.

23 THE COURT: Collateral.

24 MR. SHELY: Yes, Judge.

25 THE COURT: I have a meeting at lunch so how are you

1 feeling?

2 MR. MELTON: Pretty good, Your Honor.

3 THE COURT: What time is your plane back?

4 MR. MELTON: I'm here, Your Honor.

5 THE COURT: I thought you were commuting from Austin
6 or someplace.

7 MR. MELTON: No, Your Honor.

8 MR. ROSS: He was in Louisiana. I was in
9 California.

10 THE COURT: I just thought -- do you have a Dallas
11 office?

12 MR. ROSS: We do. But no, he wasn't there. He had
13 to get something removed from his foot and stabilize it after
14 the accident.

15 THE COURT: Well, no, I tried to put one of the
16 orders -- I don't want him doing things that are going to hurt
17 him. They have got all kinds of lawyers at Susman. You are
18 blocking a good one.

19 MR. MELTON: Your Honor, I was ordered to appear by
20 name. That's why we thought we needed to be here.

21 THE COURT: I didn't know you couldn't.

22 MR. ROSS: He can. We are back. We are back as of
23 yesterday.

24 THE COURT: I've been known to order dead lawyers to
25 show up.

1 MR. ROSS: And they have.

2 MR. MELTON: Based on past experience, I can go
3 until about 2:00 and then it starts hurting.

4 THE COURT: Could you go rest and come back at 2:00?
5 Would that be possible?

6 MR. MELTON: Sure, Your Honor. The longer -- if it
7 is not elevated above my heart it doesn't matter. That's what
8 the doctor tells me. Then it starts throbbing about 2:30 or
9 3:00.

10 THE COURT: Hang on just a minute.

11 (Discussion off the record)

12 THE COURT: 9:30 Tuesday?

13 MR. SHELLEY: That's fine, Judge.

14 MR. MELTON: I think that's fine, Your Honor.

15 That's fine, Your Honor.

16 THE COURT: All right. I'm sorry about that. But
17 I've got to go.

18 (Concluded.)

* * *

19 I certify that the foregoing is a correct transcript from the
20 record of proceedings in the above-entitled cause, to the best
21 of my ability.

22
23 //s _____
Mrs. Stephanie Carlisle White, CSR, RPR
24 Official Court Reporter

02/25/2014
Date

25